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CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES UNDER ARTICLE 40 OF THE COVENANT

Third periodic reports of States parties due in 1990

Addendum

# NEW ZEALAND*

[1 April 1994]

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* For the initial report submitted by the Government of New Zealand, see document CCPR/C/10/Adds.6, 10 and 11 and for its considerations, see CCPR/C/SR.481, 482 and 486 or Official Records of the General Assembly, Thirty-ninth session, Supplement No. 40 (A/39/40), paragraphs 161-192. For the part of the initial report relating to the Cook Islands, see document CCPR/C/10/Add.13 and for its consideration see CCPR/C/SR.579 and SR.582 or Official Records of the General Assembly, Fortieth session, Supplement No. 40 (A/40/40), paragraphs 430-464. For the second periodic report of New Zealand, see document CCPR/C/37/Adds.8, 11 and 12 and for its consideration, see CCPR/C/SR.888-891 or Official Records of the General Assembly, Forty-fourth session, Supplement No. 40 (A/44/40), paragraphs 363-404.

** The annexes are available for consultation in the files of the Secretariat.

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## I. GENERAL

1. This is the third report of the New Zealand Government, submitted under article 40, paragraph 1 (b) of the International Covenant on Civil and Political Rights. The report supplements New Zealand's initial report submitted in January 1982 (CCPR/C/10/Add.6) and New Zealand's second report submitted in June 1988 (CCPR/C/37/Add.8).

2. This third report covers the period from April 1988 to December 1993 and has been prepared in accordance with the guidelines regarding the form and content of periodic reports from States parties (CCPR/C/20/Rev.1) and also with regard to particular interests shown by the Human Rights Committee in questions and discussion when earlier New Zealand reports were presented. It should be read in conjunction with New Zealand's core document (HRI/CORE/1/Add.33), which contains general information on New Zealand's land and people and political and legal structures.

3. The period under review has seen a number of significant developments in the way in which New Zealand gives effect to the rights recognized in the International Covenant on Civil and Political Rights and seeks to develop their enjoyment by its people. Among these developments are:

(i) The accession by the Government of New Zealand to the Optional Protocol to the International Covenant on Civil and Political Rights with effect from 26 August 1989;

(ii) The ratification by the Government of New Zealand of the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, with effect from 11 July 1991;

(iii) The passage into law of the New Zealand Bill of Rights Act 1990, which entered into force on 25 September 1990;

(iv) The passage into law of the Privacy Act 1993, which entered into force on 1 July 1993;

(v) The passage into law of the Human Rights Act 1993, which entered into force on 1 February 1994. This is a measure to rationalize institutions and procedures for monitoring and enforcing anti-discrimination law, and for extending the grounds on which discrimination is prohibited.

4. The Imperial Laws Application Act 1988, foreshadowed in paragraph 7 of the previous report, came into force on 1 January 1989. Its effect is to terminate the application of all imperial laws (enactments of the Parliament of England or of Great Britain or of the United Kingdom) which had been allowed to continue in force by the New Zealand Parliament, other than those expressly preserved. Among the laws so preserved are:

(i) The Common Law: accordingly, important rules and remedies of relevance to the liberties of citizens, and discussed in earlier reports, are preserved;

(ii) Magna Carta (1297): the right to personal liberty and to freedom from molestation by State agencies except by due process of law is therefore preserved in its historic form;

(iii) The Bill of Rights (1698): important constitutional principles previously found effective in maintaining the rule of law are accordingly preserved;

(iv) The Habeas Corpus Acts: relevant provisions enabling judicial control of executive and other detentions are thereby preserved.

5. In 1989, during consideration of New Zealand's second report, the question of the right of appeal to the Privy Council was raised. The Government has recently indicated that the right of appeal to the Privy Council may be abolished within the next five years.

6. New Zealand's second report in 1989 drew attention to the debate then in progress concerning the form and content of a possible "Bill of Rights" for New Zealand. For convenience, the course of events may be recapitulated and taken to its subsequent conclusion:

(a) In 1985 a white paper titled "A Bill of Rights for New Zealand (1985)" proposed the enactment as "supreme law" of a statute empowering the courts to strike down legislation contravening the fundamental rights and freedoms set forth in the Bill of Rights.

(b) The bill proposed in the white paper was referred to a Select Committee of the Parliament which heard over 400 submissions in the course of meetings held in six cities throughout 1986.

(c) In 1987 the Select Committee made an interim report to Parliament in which it noted considerable opposition to enactment of a bill in the form proposed, on the grounds that it would give too much power to judges.

(d) In 1988 the Select Committee made its final report to Parliament, recommending a more limited bill which would not give the courts power to strike down inconsistent legislation.

(e) In 1989 the Government advised Parliament that it accepted the recommendations of the Select Committee. A bill was introduced to Parliament in October 1989 and was then itself referred to the Select Committee.

(f) In July 1990 the Select Committee reported the bill back to Parliament stating that "it may be some time yet before New Zealand is ready for a fully fledged Bill of Rights". The Committee added a provision (now section 4 of the Act) which expressly disabled the courts from striking down or declining to give effect to legislation on the ground of inconsistency with the rights and freedoms affirmed in the bill. The non-inclusion of a reference to the Treaty of Waitangi in the bill as a result of Maori preference is discussed in paragraphs 28 and 29 of New Zealand's eighth and ninth consolidated periodic report to the Committee on the Elimination of Racial Discrimination (CERD/C/184/Add.5).

7. It is outside the scope of this report to record in detail the manner in which the New Zealand Bill of Rights Act 1990 has operated since its passage through Parliament. Specific references to the application of the Act are made in the discussion of certain articles. It should, however, be recorded at this point in the report that the Act, apart from its influence on the preparation of new legislation, has given rise to a reasonable volume of litigation, notably in connection with blood/alcohol driving offences, and some complex judicial interpretation of the Act is developing. It is to be expected that the common law tradition of development and crystallization of legal principle by cumulation of decisions confined to their own facts, would require time and experience before general principles of interpretation could confidently be stated. A copy of the Act is attached as annex I.

8. By section 7 of the Act, the Attorney-General is required to report to Parliament any inconsistencies in proposed legislation with the rights and freedoms contained in the Bill of Rights. By the end of August 1993, there had been five such reports. In two of the five cases legislation has proceeded into law in a form which does not appear to remove the cause of the Attorney-General's report.

9. It must be recalled that the Attorney-General's duty to report under section 7 was, in the context of the resolution of New Zealand's debate on the Bill of Rights, intended to warn Parliament of possible inconsistencies with the rights and freedoms affirmed in the Bill of Rights, so that if Parliament determined that these were to be overridden in a particular case, it would be with foreknowledge and in full view of the electorate to whom Parliament is ultimately responsible. The reports are in no way akin to judicial determinations, but rather represent the view of the Government's principal Law Officer acting in an independent warning capacity at the time of introduction of the bill.

10. New Zealand's instrument of accession to the first Optional Protocol to the International Covenant on Civil and Political Rights was deposited with the Secretary-General of the United Nations under note dated 26 May 1989. In accordance with article 9.2 of the Optional Protocol, that instrument entered into force for New Zealand on 26 August 1989. In announcing the Government's decision to accept the Protocol, the then Associate Minister of External Relations and Trade stated in a press release dated 6 April 1989:

> "New Zealand's review of the question of ratification of the Optional Protocol was undertaken in conjunction with consideration of the proposed Bill of Rights ... These two instruments, though significantly different, both protected and promoted fundamental rights and freedoms, and the Government felt that harmonisation of approach was important".

The text of the Optional Protocol has been presented to Parliament and published for reference as New Zealand Treaty Series 1989, No. 12, A.103. As at August 1993 the Centre for Human Rights has forwarded to the Government of New Zealand two communications from individuals subject to New Zealand jurisdiction alleging violation by New Zealand of its obligation under the International Covenant. The first communication alleges discrimination against an individual with respect to his entitlement to a social security benefit. The second relates to settlement of Maori fisheries claims under the Treaty of Waitangi. At the time of writing this report, the Human Rights Committee had not ruled on the admissibility of either communication.

## II. INFORMATION IN RELATION TO SPECIFIC ARTICLES

11. In this part of the report, reference is made to significant legislative changes and important judicial decisions during the reporting period, and account is taken of questions raised by the Human Rights Committee during consideration of New Zealand's second report. Only those articles of the Covenant in respect of which there have been relevant changes or developments are covered.

### Article 1

12. The islands of Tokelau remain as New Zealand's only non-self-governing territory. With a 1991 population of 1,577 persons (4,200 persons living in New Zealand registered themselves as Tokelauan), the people of Tokelau have maintained their view, reported in New Zealand's initial and second reports, that they wish to continue close ties with New Zealand and to retain their New Zealand citizenship. They have emphasized that in order for the people of Tokelau to reach an appropriate act of self-determination they should be given the freedom to arrive at that act of self-determination rather than responding to an external set of criteria, i.e. having it imposed on them. The Ulu O Tokelau (the Tokelau-appointed leader of Tokelau) spoke at the June 1993 seminar of the Special Committee on Decolonization and indicated that Tokelau, while accepting its responsibilities, wished to gain experience with its new political role and, at its own pace, to develop the confidence that would enable it to find uniquely Tokelauan solutions to the issues before it. The movement of people in both directions between Tokelau and New Zealand continues.

### Article 2

13. The general framework by which it is sought to assure to individuals within New Zealand the rights and freedoms specified in the Covenant without discrimination in accordance with article 2 will now be found principally in the Human Rights Act 1993, a copy of which is attached as annex II. This new enactment, which became law on 10 August 1993 and will enter into force on 1 February 1994, will repeal and replace the Race Relations Act 1971 and the Human Rights Commission Act 1977 which were discussed in earlier reports. The new legislation was prepared in the light of criticism by the Human Rights Commission, established under the Human Rights Commission Act 1977, of limitations on the grounds of unlawful discrimination and of shortcomings in the structure and procedure of the 1977 Act.

14. Section 5 of the new Act provides the Human Rights Commission with a wider mandate than the earlier legislation. In addition to its already existing functions of receiving representations from the public and making public statements on matters affecting human rights, the Commission is now empowered to enquire into any matter where it appears human rights may be infringed, to issue guidelines and to report to the Prime Minister on New Zealand's compliance with international human rights instruments. It is specifically required to examine all legislation in force in New Zealand and determine prior to the end of 1998 whether any enactment conflicts with the spirit of the new Act.

15. The grounds of unlawful discrimination are found in section 21 of the new Act. That section not only groups together the old grounds from the Race Relations Act 1971 and the Human Rights Commission Act 1977 (sex, marital status, religious belief, ethical belief, colour, race, ethnic or national origins), but also adds these further grounds:

(i) Disability (which is made to include both physical and psychiatric impairments and "the presence in the body or organisms capable of causing illness");

(ii) Age (with some specified limitations);

(iii) Political opinion;

(iv) Employment status;

(v) Family status;

(vi) Sexual orientation (which is declared to mean "a heterosexual, homosexual, lesbian, or bisexual orientation").

16. These additional grounds have also been included by way of amendment in the grounds of non-discrimination in the New Zealand Bill of Rights Act 1990, a move which is seen as enhancing the human rights of New Zealanders.

17. The addition of some of the new grounds - particularly those related to sexual orientation and disability caused by pathogenic organisms - was controversial during public and parliamentary debate leading to passage of the new Act.

18. The occasions on which the unlawful grounds will operate to give an unlawful consequence and a remedy are set out in section 22 onwards. They are:

(i) In employment;

(ii) In partnerships;

(iii) In entry to, and treatment by, industrial and professional associations, qualifying bodies and vocational training bodies;

(iv) In access to places, vehicles, and facilities;

(v) In provision of goods and services;

(vi) In provision of land, housing and other accommodation;

(vii) In access to educational establishments.

19. Under each of these headings, specific exemptions are provided to permit the operation of interests considered to be legitimate. For example, section 27 (3) recognizes that some discrimination on grounds of sex may be legitimate on some employment occasions where a "reasonable standard of privacy" is required. A general provision against "indirect discrimination"

is found in section 65 of the Act, which states that practices or requirements "not apparently in contravention" of the Act, but which have the effect of discriminating on prohibited grounds on relevant occasions, will be unlawful unless "good reason" for the practice or requirement is established.

20. Part III of the Human Rights Act 1993 includes significant new provisions concerning complaints. Powers to call compulsory conferences are given to the newly-created "Complaints Division". An important change is the very substantial raising of the monetary limits on awards of damages by the "Complaints Review Tribunal", as the old "Equal Opportunity Tribunal" is renamed. The limit is now the same as that applying to the District Court, i.e. $200,000.

21. A further important change brought about by the Human Rights Act 1993 concerns provisions against incitement of racial disharmony. In 1977, an amendment to the Race Relations Act 1971 had created the offence of publishing or using threatening, abusive or insulting matter or words, being "matter or words likely to excite hostility or ill-will against ... any group of persons in New Zealand on the grounds of the colour, race, ethnic or national origins of that group of persons" (sect. 9 (A)). That provision was repealed by the Race Relations Amendment Act 1989 because it gave rise to difficulties identified in New Zealand's most recent report to the Committee on the Elimination of Racial Discrimination (see CERD/C/184/Add.5, para. 14). The Human Rights Act 1993 contains a more carefully drafted provision attempting to avoid these difficulties. In particular, the new section 61 provides that it is not essential that words be used in a "public place", if the user knew or ought to have known that the words were reasonably likely to be published or broadcast. Secondly, a fair report of words constituting the offence will not itself constitute an offence.

22. Sections 62 and 63 respectively create actionable wrongs in respect of "sexual harassment" and "racial harassment". Inquiries and complaints concerning the former have increased markedly in recent years, as the annual reports of the Human Rights Commission show.

23. Structurally, one of the functions of the new Act is to bring within one enactment several previously separate streams of anti-discrimination law, and to bring into the one "Human Rights Commission" Commissioners having responsibilities for human rights, race relations, and privacy.

24. The wide range of inquiry, monitoring and publicity engaged in by the Human Rights Commission and the Race Relations Conciliator during the period under review will best be assessed from the annual reports (jointly presented) for the years ended March 1989, June 1990, 1991 and 1992. These are supplied as annex C.

## Article 3

25. The New Zealand Government has recently submitted its second report on the Convention on the Elimination of All Forms of Discrimination Against Women. The CEDAW report, a copy of which is supplied as annex I, provides a comprehensive account of the status of women in New Zealand, and will provide

much information of the kind sought by the Human Rights Committee on this subject in written and oral questions on the occasion of the presentation of New Zealand's second report in 1989.

26. Major legislative changes since 1988 with a significance for women are:

(a) The Employment Contracts Act 1991 covers discrimination in employment on the grounds of sex. It requires personal grievance procedures in all contracts of employment, and provides women employees with the right to take sex discrimination and sexual harassment cases as personal grievances.

(b) The Child Support Act 1991 obliges parents to maintain their children regardless of the parents' marital relationship or whether or not the parents are guardians of their children. Under this Act the parent who has custody of a child can apply for maintenance from the other parent by making application to the Inland Revenue Department for a formula assessment of maintenance payable. The payment of maintenance is then enforced by that Department. The Family Court can review and reassess the amount of maintenance payable at the request of either parent only on very restricted criteria.

(c) An employment Equity Act was passed in 1990, constructed within the industrial relations legislative framework prevailing at that time. The Commission for Employment Equity was established to monitor and assist with the implementation. However, following the general election the Act was repealed in December 1990, and a new industrial relations framework was put in place by the Employment Contracts Act 1991. In late 1991 the Government, in conjunction with the New Zealand Employers Federation, established the Equal Employment Opportunity Trust to promote equal employment opportunities as good business management practice. The Trust receives funding from the Government. The Government also established the Equal Employment Opportunities Fund, which makes funding available on a competitive bidding basis for projects promoting equal employment opportunities practice amongst private sector employers.

(d) The Films, Videos, and Publications Classification Act 1993, which seeks to curb the availability of pornographic material harmful to the public good, is aimed in part at preventing the demeaning of women.

(e) The Human Rights Act 1993, as has been noted, consolidates and enhances protections previously found in the Human Rights Commission Act 1977. It may be observed also that the 1993 Act has added a statutory remedy for "sexual harassment" (sect. 62) a feature of which is a provision that "where a person complains of sexual harassment, no account shall be taken of any evidence of the person's sexual experience or reputation" (sect. 62 (4)). The remedies under the Human Rights Act 1993 and the Employments Contracts Act 1991 are alternative and a choice must be made by the complainant of one or the other (sect. 64).

27. A major event in promoting women's equality has been the celebration of the 1993 Suffrage Centennial Celebrations. This year marks the 100th anniversary of New Zealand women gaining the right to vote.

## Article 4

28. During the presentation of New Zealand's second report in 1989 the Human Rights Committee asked questions and made comments on the provisions of the International Terrorism (Emergency Powers) Act 1987. Since 1989, the New Zealand Law Commission has undertaken a review of the law which should govern the action to be taken in various types of emergency. The First Report on Emergencies: Use of the Armed Forces (NZLC R12 1990) was largely implemented by the Defence Act 1990. The Law Commission's Final Report on Emergencies (NZLC R22 1991) addressed in a comprehensive manner the question of balance in emergency powers. A copy of the Final Report is supplied as annex E. Generally, the Commission recommended that when emergency powers are required they should be conferred in "sectoral legislation, that is legislation tailored to the needs of the particular kind of emergency" rather than in general, all-purpose legislation. The President of the Commission observed in transmitting the report to the Minister of Justice:

> " ... the Report recommends the enactment of two statutes: a War Emergencies Act and a new Civil Defence Act replacing the Act of 1983. It also recommends the repeal of the International Terrorism (Emergency Powers) Act 1987 when new general legislation relating to police powers is enacted".

29. In the Final Report, the Law Commission discusses the safeguards that should be employed to prevent the abuse of emergency powers. These include supervision of their exercise by Parliament and review of emergency action by the courts. The Commission stressed the need to protect individual rights in accordance with the New Zealand Bill of Rights Act 1990 and the International Covenant on Civil and Political Rights. At paragraphs 7.87 to 7.93 points raised by the Human Rights Committee in relation to the International Terrorism (Emergency Powers) Act 1987 are considered. At paragraphs 7.148 to 7.153 further relevant discussion is found leading to the conclusion at paragraph 7.162:

> "The Law Commission is of the view that the media coverage provisions are likely to prove ineffective in practice and that, in these circumstances, the encroachment on the right of freedom of expression as set out in Article 19 of the International Covenant on Civil and Political Rights and s.14 of the New Zealand Bill of Rights Act 1990 is not justified. It therefore recommends the repeal of the provisions".

30. The Final Report discusses a number of emergency sectors including:

War emergencies and other armed conflicts (including armed insurrection or civil war) and nuclear or biological disasters;

Serious civil disturbances, including terrorist incidents;

The protection of New Zealand's flora and fauna from exotic diseases and pests;

Natural and industrial disasters and other emergencies falling within the scope of the Civil Defence Act 1983;

Pollution and the escape of hazardous substances.

## Article 6. Right to life

31. As foreshadowed in an answer to the Human Rights Committee's written questions arising from New Zealand's second report, the death penalty has now been entirely removed from New Zealand law. The Abolition of the Death Penalty Act 1989 came into force on 28 December 1989. The Act completely removes the death penalty as a criminal sanction under New Zealand law. Prior to its enactment the death penalty could be imposed for the crime of treason under the Crimes Act 1961 and for certain military offences under the Armed Forces Discipline Act 1971. The Act substitutes a sentence of life imprisonment which is now the most severe penalty that can be imposed in New Zealand. The Act also amends the Extradition Act 1965 and the Fugitive Offenders Act 1881 (UK) by conferring a discretion on the Minister of Justice to refuse to return an offender to a country requesting extradition if the offender is liable to be sentenced to death in that country. In 1991 New Zealand became the first country to ratify the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty.

32. In a written question in 1989, the Human Rights Committee reminded the New Zealand Government of the Committee's view that "the right to life" should be broadly interpreted so as to comprehend steps to prevent armed conflict and the proliferation of weapons of mass destruction, and is to be measured also by such indicators as infant mortality and life expectancy.

33. New Zealand continues to take an active role in international security, disarmament and arms control matters. In October 1993, the Government ratified the Inhumane Weapons Convention 1980, which attempts to prevent, under Protocol 2, the use of land mines against civilians. New Zealand signed the Chemical Weapons Convention in January 1993. New Zealand armed forces are currently participating in United Nations peace-keeping operations in Somalia, Cambodia, the Middle East, Angola and the Former Republic of Yugoslavia.

34. In 1990 the infant mortality rate (infants under one year) was 8.4 per 1,000 live births. For non-Maori the rate was 7.4, while for Maori it was 16.4. For the population as a whole, life expectancy at birth is 72.9 years for men and 78.7 years for women (1990-1992 figures). For the non-Maori population, life expectancy at birth was 73.4 years for males and 79.2 years for females, while for Maori it was 68 and 72.9 years respectively.

## Article 7

35. Article 7 of the Covenant condemns and proscribes conduct ranging from "torture" to "degrading". The comparable section in the New Zealand Bill of Rights Act 1990 is similarly constructed:

> "Everyone has the right not to be subjected to torture or to cruel, degrading, or disproportionately severe treatment or punishment" (sect. 9).

### "Torture"

36. As foreshadowed in paragraph 33 of the second report, New Zealand has now ratified the 1984 Convention against Torture and Other Cruel, Inhuman or

Degrading Treatment or Punishment. This occurred on 10 December 1989, bringing the Convention into force for New Zealand from 9 January 1990; New Zealand presented its first report under the Convention on 13 November 1992.

37. The Crimes of Torture Act 1989 sought to bring New Zealand law into conformity with the requirements of the Convention. The Act defines an "act of torture" as any act or omission by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as the obtaining of information, punishment, intimidation or coercion, or for any reason based on discrimination. Lawful sanctions consistent with the articles of the International Covenant on Civil and Political Rights are specifically excluded from this definition. The Act provides that commission of an act of torture by a public official, a person acting in an official capacity, or a person acting at the instigation of such an official is punishable by a maximum of 14 years imprisonment. Attempting and conspiring to commit acts of torture are punishable by a maximum of 10 years imprisonment. Prosecutions for crimes of torture may only be instituted with the consent of the Attorney-General.

38. The Act provides authority for the extradition of persons accused or convicted of crimes of torture. However, it is also provided that such a person shall not be surrendered if it appears that the surrender, although purporting to be sought in respect of a crime of torture, is sought for the purpose of punishing or prosecuting the accused on account of his or her race, ethnic origins, religion, nationality or political opinions, or if it appears that the person's trial in the requesting country may be prejudiced by these factors. In respect of extradition requests generally, there is provision for the request to be refused if the Minister of Justice is of the opinion that there are substantial grounds for believing that the offender would be in danger of being subjected to an act of torture in the requesting country.

39. The Act also provides that the Attorney-General must consider whether the Crown should pay compensation to a victim of an act of torture (or the victim's family). This provision does not derogate from any other right to compensation under New Zealand law.

"Other treatment or punishment"

40. In paragraph 36 of the second report, reference was made to the Government's intention to abolish corporal punishment in schools. This has been effected by the enactment of the Education Amendment Act 1990, which has inserted a new section 139A in the Education Act 1989. The new provision declares that no employees of early childhood centres or registered schools, or persons supervising on their behalf, shall "use force, by way of correction or punishment, towards any student or child ... unless that persons is a guardian of the student or child". Furthermore, section 59 of the Crimes Act 1961, which had hitherto authorized the use of force by teachers and persons "in the place of a parent", has been recast as follows:

> "59. Domestic discipline - (1) Every parent of a child and, subject to subsection (3) of this section, every person in the place of the parent of a child is justified in using force by way of correction towards the child, if the force used is reasonable in the circumstances ...

(3) Nothing in subsection (1) of this section justifies the use of force towards a child in contravention of section 139A of the Education Act 1989."

41. The result is thus that although parents may continue to use "reasonable" corrective force, schools are prevented from so doing. The change was controversial in New Zealand but there is some evidence that, once the adjustments were made, the reform has gathered support.

42. The Commission for Children, appointed under section 411 of the Children, Young Persons, and their Families Act 1989, conducted an inquiry under that provision following receipt of a complaint that a number of pupils at a school had been made by teachers to remove their clothing down to their underwear in an apparent search for drugs. The Commissioner reported that the procedure used was "degrading" and failed to meet the standards of the New Zealand Bill of Rights Act 1990, and recommended steps to avoid repetition. The Commissioner's report is found at Re Strip Search at Hastings Boys High School [1990-92] 1 NZBORR 480.

43. In relation to police conduct, it will be recalled that the Police Complaints Authority Act 1988 established an independent body to inquire into complaints concerning the actions of the police. The annual reports of the Police Complaints Authority for the years 1991 and 1992 are attached as annex F. Detailed information about the work of the Authority will be found in New Zealand's initial report to the Committee against Torture (CAT/C/12/Add.2).

"Medical or scientific experimentation"

44. The Health Information Privacy Code issued by the Privacy Commissioner in 1993 gives some practical effect to article 7 in that under the code of practice individuals have rights (which can be enforced through the Complaints Review Tribunal) to be told of the purpose for which health information is collected directly from them. There is no specific exception for research purposes; it follows that individuals must be told if they are being asked for information about themselves for medical research purposes. (Further information about the role of the Privacy Commissioner is provided in paras. 84-92 below).

## Article 8

45. In relation to New Zealand law on "slavery", the case of R. v. Decha Iamsakun [1993] 1 NZLR 141 may be noted. A Thai woman came to New Zealand under arrangements made by the accused to work in a massage parlour and a go-go bar. The accused insisted that she pay most of her earnings to him. At a later time, the accused was alleged to have offered to sell the woman to an undercover police officer. A charge of "dealing in slaves" was brought under section 98 (1) of the Crimes Act 1961 and the accused was convicted. On appeal, and in upholding the conviction, the Court of Appeal made observations concerning the meaning of the expression "slave" in the Act. The Court found that the definition "a person held as property" was apt and sufficient.

## Article 9

46. The intent of article 9 of the Covenant is reflected in sections 21, 22 and 23 of the New Zealand Bill of Rights Act 1990. As the President of the New Zealand Court of Appeal has observed in the recent case of R. v. Goodwin [1993] 2 NZLR 153 (p.161):

> "by s. 21 everyone has the right to be secure against unreasonable seizure of his person; by s. 22 everyone has the right not to be arbitrarily arrested or detained; and by s. 23 everyone who is arrested or who is detained under any enactment has the right to be told the reason and the right to consult and instruct a lawyer without delay".

47. In the leading case of Ministry of Transport v. Noort [1992] 3 NZLR 260, in which the Court of Appeal ruled evidence inadmissible, where obtained after violations of the Bill of Rights provisions, the President stated (p. 270):

> "In approaching the Bill of Rights it must be of cardinal importance to bear in mind the antecedents. The International Covenant on Civil and Political Rights speaks of inalienable rights derived from the inherent dignity of the human person. Internationally there is very general recognition that some human rights are fundamental and anterior to any municipal law, although municipal law may fall short of giving effect to them".

48. In R. v. Goodwin (No. 2) [1993] 2 NZLR 390, the President of the Court of Appeal referred to the jurisprudence developed by the Human Rights Committee and to its significance for interpretation of the New Zealand Bill of Rights Act 1990. He stated (p. 393):

> "... the Human Rights Committee of the United Nations held in 1990 that to avoid arbitrariness a remand in custody must not only be lawful but reasonable and necessary in all the circumstances: van Alphen v. The Netherlands ... On that view it would appear that unlawful detention is necessarily arbitrary, unless the Committee was influenced by the reference in the article to unlawful as well as arbitrary deprivation of liberty ... Whether a decision of the Human Rights Committee is absolutely binding in interpreting the New Zealand Bill of Rights Act may be debatable, but at least it must be of considerable persuasive authority".

49. The Human Rights Committee has previously expressed interest in the reform of New Zealand's legal regime concerning mental health, the protection of the civil rights of patients, and the circumstances under which non-consensual treatment could be administered (see paras. 38 to 42 of the second report, and the summary records of the 888th and 889th meetings of the Human Rights Committee). In November 1992 the Mental Health (Compulsory Assessment and Treatment) Act 1992 came into force. This legislation replaces the Mental Health Act 1969, and represents the culmination of almost 10 years of review of the 1969 Act. It is the result of considerable consultation with health professionals, consumers and their care givers. A copy of the Act is provided as annex G.

50. The Mental Health (Compulsory Assessment and Treatment) Act 1992 emphasizes assessment of the need for treatment, rather than detention. Once the need for treatment is established, a decision is made about whether that treatment should be provided on an in-patient or an out-patient basis. As part of this change in focus, hospitals are no longer designated as separate psychiatric institutions, and patients can be treated within the general hospital structure. A provision remains to permit the establishment of psychiatric security institutions, to which patients presenting special difficulties can be transferred with the approval of the Director of Mental Health. There is only one such institution in New Zealand.

51. Part I of the Mental Health (Compulsory Treatment and Assessment) Act sets out the procedures for assessment and treatment of persons who are believed to be mentally disordered within the meaning of the Act. This involves several stages of assessment, before application can be made to the court for a compulsory treatment order. Part II contains detailed procedures to be followed by the court before a compulsory treatment order can be made. There are two types of such orders: in-patient compulsory treatment orders and community compulsory treatment orders. The Act expresses a preference for community treatment orders to be made wherever practicable. The Mental Health (Compulsory Treatment and Assessment) Act pays particular attention to the rights of patients. Part V of the Act lists the rights of patients and provides for investigation of complaints of breach of rights. District inspectors and official visitors appointed by the Minister of Health are responsible for ensuring that these rights are upheld, and for investigating any breach of rights. There are specific provisions in the Act requiring regular and on-going clinical reviews of patients. There are also provisions for appeal against the outcome of a clinical review to be made to the review tribunal and ultimately, to the court.

52. In 1991 the Human Rights Commission reported to the Prime Minister on a sequence of events at Carrington and Kingseat Hospitals. Following the escape of a patient, and the rape of a young woman in Auckland, the hospitals locked the wards, thus effecting a mass detention of the patients. After considering the events in the light of domestic law (then the Mental Health Act 1969) and international instruments, including the International Covenant on Civil and Political Rights, the Commission concluded that the locking of the wards was a contravention of human rights. The Commission observed that:

> "Should it be necessary to restrict patients' rights in the interests of community safety, the restriction of the right must be exercised reasonably. Assuaging unreasonable public fears and condemnation is not sufficient justification for the abrogation of a right". (p. 14)

The Commission also pointed to the danger of blurring the lines between "rights" and "privileges":

> "It is not legitimate for an authority to withhold or remove rights, call them privileges and subsequently confer them at its discretion, when it has a duty to provide them". (p. 14)

53. It is accepted by the New Zealand Government that the vulnerability of children and young people entitles them to special protection during criminal investigations. Accordingly, children (10 to 13 year-olds) and young people

(14 to 17 year-olds) who are apprehended by law enforcement officers are entitled to special rights and protections under the youth justice provisions of the Children, Young Persons, and Their Families Act 1989. Principle 208 (a) of the youth justice provisions of this Act states that unless public interest requires otherwise, criminal proceedings should not be instituted against a child or young person if there is an alternative means of dealing with the matter.

54. Section 215 sets out a list of rights that children/young people must be informed of prior to being questioned by an enforcement officer in relation to the commission or possible commission of an offence. The law requires that these explanations must be given in a manner and language appropriate to the age and level of understanding of the child or young person and an adult nominated by the child or young person must be present when any questioning takes place. Parents or guardians, if not present, must be informed that a child or young person is held at the enforcement agency office for questioning.

55. Section 208 (d) of the Children, Young Persons, and Their Families Act states that a child or young person who commits an offence should be kept in the community so far as that is practicable and consonant with the need to protect public safety. If a child or young person is arrested for an offence they may be released. But where absconding, the destruction of evidence relating to the offence, or public safety is at issue the child or young person may be delivered, within 24 hours, into the safe custody of the Director-General of Social Welfare. Only if there is no such placement immediately available, may they be detained in police custody for a period exceeding 24 hours.

56. A child or young person may be placed in secure care within a residence only if certain conditions apply:

(a) To prevent the child or young person from absconding from the residence where:

(i) The child or young person has, on one or more previous occasions, absconded from a residence or police custody; and

(ii) There is real likelihood that the child or young person will abscond from the residence; and

(iii) The physical, mental or emotional well-being of the child or young person is likely to be harmed if the child or young person absconds; or

(b) To prevent the child or young person from behaving in a manner likely to cause physical harm to that child or young person or to any other person.

57. Section 21 of the Crimes Act 1961 provides that no child under the age of 10 shall be convicted of an offence. Section 22 of the Crimes Act provides that no person shall be convicted of an offence committed by him or her between the ages of 10 and 13 unless at the time the offence was committed he or she knew that the conduct was "wrong or that it was contrary to law".

However by virtue of the provisions of the Children, Young Persons, and Their Families Act 1989, children aged between 10 and 13 can only be prosecuted for the offences of murder and manslaughter.

## Article 10

58. Paragraph 51 of New Zealand's second report refers to changes made to parole and early release by the Criminal Justice Amendment Act (No. 3) 1987. Further changes are made by the Criminal Justice Amendment Act 1993. These are as follows:

(a) The Act enables the indeterminate sentence of preventive detention to be imposed on offenders convicted of sexual violation. At present this can only be imposed where the offender has, on an earlier occasion, been convicted of certain offences. The new provision targets those who do not have a previous conviction but who are likely to re-offend in a similar manner in the future.

(b) The Act also enables the sentencing court in the case of certain serious violent offences to impose a minimum period of imprisonment which is longer than the statutory minimum time which an offender must serve in prison (i.e. the non-parole period of the sentence). At present such offenders must serve two thirds of their sentence before being released. Under the new Act the minimum period the court imposes cannot be longer than 10 years or encroach into the last three months of the sentence when the offender will be released on conditions set by the parole or district prisons board.

(c) The changes also affect parole decisions. At present the Parole Board may release offenders serving indeterminate sentences of life or preventive detention after 10 years. The Act enables the court to order that an offender shall not come before the Board for a longer period.

(d) The Act also widens the grounds upon which an offender subject to sentences of imprisonment may be recalled. The recall decision will now be made by the Chairperson of the appropriate parole board or district prisons board rather than on application to the court. The offender will have a right of appeal to the High Court against an order for recall.

(e) The Act introduces changes to the structure of prison sentences. The sentence imposed by the court will have effect for the whole period designated. The first portion of the sentence will be spent in prison. The second portion will be spent in the community on conditions. Fixed-term offenders who have not been convicted of serious violent offences, will have their cases considered by the district prison boards, after having served one third of their sentence. However, they need not be released at this date. As a general rule these offenders must be released on conditions by their two thirds date. Serious violent offenders will be released at their two thirds date unless the court has imposed a minimum period of imprisonment, in which case they will not be released until that minimum period expires. Both types of offenders will be released on conditions imposed by the parole or district prisons board. These conditions are to assist the offender's reintegration into society and ensure some control over the offender for the

remainder of the sentence in the public interest. At present, determinate sentence offenders serving seven years or more can be subject to post release conditions for a maximum period of six months only.

59. Paragraph 43 of the second report referred to the Ministerial Committee of Inquiry into the Prisons System chaired by High Court Judge Sir Clinton Roper. Its report (published in 1989) was entitled "Te Ara Hou: the new way". Its recommendations were wide ranging covering all aspects of the prisons system. A number of departmental committees have studied the Committee's recommendations and reported on them. It is envisaged that a new penal institutions bill will ultimately be introduced implementing a number of reforms based on the Committee's recommendations. A key recommendation of the report was for the establishment of a number of habilitation centres separate from prisons to undertake the habilitation of inmates. The Criminal Justice Amendment Act enables offenders to be released to habilitation centres thus enabling one of the main recommendations of the 1989 report to be implemented. Another release option available under the Act is home detention. It is envisaged that both habilitation centres and home detention will initially be the subject of a pilot scheme. Finally, the Act provides the courts with a more extensive range of sentencing options. Community based sentences will be able to follow terms of imprisonment of 12 moths or less. This means an offender in this category could be released to any of the sentences of community service, community programmes, supervision or periodic detention. Another new option is that of the suspended sentence, which will be particularly helpful for dealing with young offenders.

60. A further development in the penal area is the introduction of the Penal Institutions Amendment Bill 1993 which provides for private contracting of prison management. The bill has been reported back from the Select Committee and awaits its second reading.

61. It will be recalled that New Zealand made a reservation to article 10 on the mixing of juveniles and adults in prisons. The comment contained in paragraph 50 of the second report still applies. In respect of compliance with the Covenant and the United Nations Standard Minimum Rules for the Treatment of Prisoners, the Department of Justice's Criminal Justice Briefing Notes address the question of the conformity of New Zealand's Penal Institutions Act 1954, which lays down regulations for New Zealand prisons, with the Standard Minimum Rules for the Treatment of Prisoners.

Young Prisoners: Rule 8 (d) of the Standard Minimum Rules provides that young prisoners shall be kept separate from adults. Regulation 167 of the Penal Institutions Regulations states that so far as practicable inmates under 20 years shall be kept apart from inmates of over that age. However, the Secretary for Justice may direct the mixing of any inmates or class of inmates under the age of 20 years with any inmates over that age, if the Secretary is satisfied that it is in the best interests of the inmates. The Department considers the best approach is a mix of facilities allowing for flexibility in the disposition of young inmates.

Individual cells: Rule 9 (1) provides for each inmate to be housed in an individual cell. High inmate numbers have meant that this is not always possible. However, the Department recognizes that the rule should be observed whenever possible.

Sanitary installations: Rule 12 provides for adequate sanitary installations to enable every prisoner to comply with the needs of nature when necessary and in a clean and decent manner. These standards are not always met due to lack of resources. However, in recent years several hundred cells have been constructed containing toilet facilities and work is proceeding to instal toilets in existing cells.

Pre- and postnatal facilities: Rule 23 (1) provides that women's institutions should have special accommodation for pre- and postnatal care and treatment, and that arrangements should be made wherever practicable for children to be born outside the prison. It has not been departmental practice to admit children to prison with their mothers and as a result there are no special full-time facilities provided for children or babies in prisons. Where a mother intends keeping her child she may subsequently be released by the exercise of the royal prerogative of mercy or under the temporary release provisions (sects. 21 and 28) of the Penal Institutions Act, or under the early release provision (sect. 91) of the Criminal Justice Act 1985.

Staff in women's institutions: Rule 53 (2) and (3) states that male staff members should not enter women's institutions unless accompanied by a woman officer and that women inmates should be supervised and attended only by female custodial staff. The prison service in New Zealand is fully integrated, with officers of either sex working in all institutions. It is considered that this adds to the normalization of the prison environment.

Prisoners' dignity as human beings: Rule 60 states that the "regime of an institution should seek to minimize any differences between prison life and liberty which tend to lessen the responsibility of the prisoners or the respect due to their dignity as human beings". Rule 21 (1) says that every prisoner who is not employed in outdoor work must have at least one hour of suitable exercise in the open air daily if weather permits. In March 1985 the Ombudsman reported on conditions for inmates on protective segregation at Mt. Eden. He was of the view that Rules 60 and 21 (1) were not at that time adequately complied with. Since 1985 significant advances have been made in the accommodation and treatment of inmates in protective segregation. Special segregation wings have been established in the majority of institutions, including Mt. Eden.

Individual programmes: Rule 69 states that a programme of treatment shall be prepared for each prisoner in the light of the prisoner's individual needs, capacities and disposition. Over the last two years the Department has implemented a case management policy to enable assessment of inmates' programmes and other needs to take place.

Psychiatric treatment: Rule 82 provides for the insane and mentally abnormal to be removed from prisons to mental institutions. Such provisions exist in New Zealand. However, the Department has to take responsibility in practice for a substantial number of inmates who are suffering from a varying degree of psychiatric disturbance because of the admission policies of psychiatric hospitals.

Prisoners' clothing: Rule 88 (1) states that untried prisoners shall be allowed to wear their own clothing if it is clean and suitable. United Nations Rule 88 (2) provides that if a remandee wears prison dress it should be different from that supplied to convicted prisoners. Regulation 163 (2) of the Penal Institutions Regulations allows the Secretary for Justice to designate any institution or part of an institution to be a place in which inmates awaiting trial shall be required to wear institutional clothing, if the Secretary considers this would benefit the institution's security. At present the only remand prisoners required to wear institutional clothing are those in the maximum security remand unit at Mt. Eden prison, who are required to wear prison track suits for security reasons. Elsewhere, remand prisoners can wear prison clothing if they do not have suitable clothing of their own available.

62. In 1993, following allegations of misconduct of prison officers at Mangaroa prison, including an allegation that in January 1993 a group of prison officers systematically attacked a group of inmates over a period of days, and left some outside, stripped, overnight, the Minister of Justice commissioned an inquiry into management practices at the prison. In July 1993 a report examining the causes of the allegations, and assessing the adequacy of current management and training practices for prisons was submitted to the Minister of Justice. The report found a number of practices and systems to be unsatisfactory and made recommendations for improvement. A copy of the report entitled Ministerial Inquiry into Management Practices at Mangaroa Prison (July 1993) is provided as annex H. The Minister of Justice has accepted the majority of the recommendations and directed that initiatives be taken for their implementation. The police are currently considering whether to prosecute any of the officers at Mangaroa prison under the Crimes of Torture Act.

## Article 12

63. In 1993 three civil liberties organizations sought a declaratory judgement on participation of the New Zealand Police in a procedure known as the "Kaitaia Shoplifter Trespass Notice Scheme". The procedure contemplated that occupiers of business premises in the town of Kaitaia would authorize the police to act as the agent of those occupiers for the purposes of issuing warnings pursuant to the Trespass Act 1980; the police would issue to persons apprehended on suspicion of shoplifting notices under the Trespass Act on behalf of all occupiers participating in the scheme, thus having the purported effect of barring those persons from all participating premises. It was claimed that the scheme infringed several provisions of the New Zealand Bill of Rights Act 1990, and also that it was contrary to constitutional principle as articulated in the Magna Carta (1297) and the Bill of Rights (1688) as involving the usurpation without legal authority of a power to inflict punishment or penalty. The Solicitor-General gave a legal opinion that the trespass scheme as it was operated at Kaitaia was an abuse of police power because its application was excessive and out of proportion to the risk of further offending by those involved, and because the conditions required by s4 (2) of the Trespass Act were not met in all cases. The police then withdrew from participating in the Kaitaia scheme, and the court action did not proceed. After further consultation with the Solicitor-General, guidelines for the enforcement by the police of the Trespass Notice Scheme

were introduced. In future the police will not be actively involved unless the occupiers concerned are unable (through intimidation or otherwise) to use the provisions of the Trespass Act themselves.

## Article 13

64. The position of non-New Zealand citizens resident, or temporarily present, in New Zealand remains broadly as described in paragraphs 61 and following of the Immigration Act 1987 is described, although the Immigration Amendment Act 1991 has brought about some changes as outlined below.

65. As regards appeals against refusal of a residence permit or visa, the Immigration Amendment Act 1991 established the Residence Appeal Authority. Any person whose application for a residence visa or a residence permit has been declined by a visa officer or an immigration officer has the right to appeal within 42 days to the Residence Appeal Authority. (The right of appeal does not apply where the Minister has refused to grant a residence permit or visa). An appeal to the Residence Appeal Authority must be based on one or other of the following grounds:

(a) That the refusal to grant a residence visa or residence permit was not correct in terms of the government residence policy applicable at the time the application for the visa or permit was made;

(b) That the special circumstances of the appellant are such that an exception to the government residence policy should be considered.

66. Non-New Zealand residents, on whom a removal order for being unlawfully in New Zealand has been served, have the right under the Immigration Amendment Act 1991 to appeal to the Removal Review Authority for cancellation of the removal order. This procedure replaces appeals to the Minister against removal. Under section 63A of the Act, a person on whom a removal order is served may appeal to the Removal Review Authority for an order cancelling the removal order on the ground that the person is not unlawfully in New Zealand. Under section 63B a person may also appeal to the Removal Review Authority on exceptional humanitarian grounds. The Authority may cancel the removal order or reduce the period during which it would otherwise remain in force, if it is satisfied that, because of exceptional circumstances of a humanitarian nature, it would be unjust or unduly harsh for the person to be removed from New Zealand or not to be allowed to return to New Zealand for the five-year period the order stays in existence and it would not be contrary to the public interest to allow the person to remain in New Zealand or to return to New Zealand before the end of the five-year period.

67. Sections 115 and 115A preserve a right of appeal to the High Court on questions of law against decisions of the Residence Appeal Authority and Removal Review Authority respectively. Section 116 provides for a right to appeal to the Court of Appeal by leave.

68. The Immigration Act provides for a right to review of a deportation order made against a non-New Zealand citizen lawfully in New Zealand. These procedures were explained in paragraphs 67 to 70 of New Zealand's second periodic report.

69. Non-New Zealand residents who have a "well-founded fear of persecution" for reasons of race, religion, nationality, membership of a particular social group or political opinion have the right to lodge an application for refugee status in New Zealand. (New Zealand is a party to the 1951 Convention and 1967 Protocol relating to the Status of Refugees). Applicants who are granted refugee status are usually invited to apply for residence in New Zealand.

70. Prior to 1991 the procedure for determining applications for refugee status was administered by the Ministry of Foreign Affairs and Trade, which chaired the Interdepartmental Committee on Refugees. The Committee consisted of representatives of the Ministry of Foreign Affairs and Trade, the New Zealand Immigration Service and, depending on the circumstances, the New Zealand Police and the Prime Minister's Department. A representative of the United Nations High Commissioner for Refugees was an advisory member of the Committee and attended most Committee hearings and took part in its deliberations. The Committee granted applicants (who could be represented) an oral hearing, made an assessment of each case and then made a recommendation to the Minister of External Relations and Trade and the Minister of Immigration, who jointly made the final decision on each case.

71. New procedures for determining refugee status were introduced on 1 January 1991. The procedures were established by Cabinet directive and are not governed by statute. Under these procedures, responsibility for determining refugee claims was transferred to the New Zealand Immigration Service. A two-stage determination process was set up, involving an initial determination by the Immigration Service's Refugee Status Section, with an automatic right of appeal to the Refugee Status Appeals Authority. The refugee status determination procedures of 1 January 1991 have been supplemented by formal Terms of Reference of the Refugee Status Section and the Refugee Status Appeals Authority which were approved by Cabinet and came into force on 30 August 1993. The Terms of Reference governing New Zealand's refugee status procedures are provided as annex I.

72. The Refugee Status Appeals Authority is an agency which is independent of the Government. It currently consists of a number of legally qualified members, as well as a representative of the United Nations High Commissioner for Refugees. The Authority is not bound by the strict rules of evidence and may inform itself as it thinks fit. Appellants may be represented and are entitled to a hearing before the Authority, unless their claims are "manifestly unfounded" or "manifestly well-founded" (in which case the Authority may dispense with a hearing and make a decision on the papers).

73. During the period of the Gulf War in 1991 the Government introduced provisional procedures for determining refugee status as a security measure for dealing with individuals arriving at the border with inadequate documentation. Under these procedures, a number of persons who arrived at a New Zealand port of entry with false documentation or without documentation were refused entry and detained pending determination of their security status. Twenty such persons were subsequently removed from New Zealand because they were not given a security clearance. (See also New Zealand's report to the Committee against Torture (CAT/C/12/Add.2).) The New Zealand authorities considered that the steps taken were justified in the circumstances and were in accordance with the requirements of the Convention and Protocol relating to the Status of Refugees and the Convention against

Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, to which New Zealand is a party. The application of the provisional procedures was upheld by the Court of Appeal in D. v. Minister of Immigration [1991] 2 NZLR 673 as being within the law, although the Court noted some deficiencies in that law.

## Article 14

74. New Zealand adheres to the important principle that everyone shall be entitled to a fair and public hearing and that the public may only be excluded from all or part of a trial in very limited circumstances. The approach remains as discussed at paragraphs 171 and 172 of New Zealand's first report and 72 and 73 of the second report.

75. A significant new provision which provides for closed court proceedings to recognize the interest of the private lives of the parties and the interests of juvenile persons is the Children, Young Persons, and Their Families Act 1989 which replaces the Children and Young Persons Act 1974. Additionally, the Evidence (Videotaping of Children Complainants) Regulations 1990 have been made pursuant to the Evidence Act. These regulations provide the manner in which evidence of child complainants is to be videotaped and provides for its admissibility. The regulations have been made for a number of reasons, not all relating to privacy (for example, to provide evidence as contemporaneous as possible, to guide questioners, to settle issues of admissibility). However, they do recognize in part the need to preserve the privacy of the child in court, particularly in the case of sexual offences.

76. The Legal Services Act 1991 brings together in one comprehensive statute the provisions relating to legal aid for both civil and criminal proceedings. Under this Act, one body, the Legal Services Board, is responsible for the delivery of criminal and civil legal aid and the duty solicitor scheme. Decisions on individual applications are made by District Legal Aid Committees. The composition of the Board and Committees ensures across section of the public is represented. The Board and Committee membership includes Maori and community law centre representation and two members appointed on the joint nomination of the Ministers of Consumer Affairs and Women's Affairs.

77. The Legal Services Board has a number of functions relating to the provision of equal access to legal representation. Its primary function is to ensure the inexpensive, expeditious and efficient operation of criminal and civil legal aid, consistent with the spirit of the Act. It also has a range of other functions aimed at improving the delivery of legal services. For example, assisting with the establishment and funding of community law centres and sponsoring, monitoring and evaluating pilot schemes for the provision of legal services and research into the provision of legal services.

78. The Law Practitioners Amendment Act 1991 provides for the payment of interest on solicitors' trust accounts. The interest is paid to the Legal Services Board for the purpose of funding of community law centres as a first priority and then for other purposes of a public nature, such as law-related education, pilot schemes and research relating to the provision of legal services.

79. An issue has arisen with respect to the propriety of publication and circulation by the police of "bulletins" identifying persistent and active criminals. The practice of publishing such profiles of persistent offenders was one of the grounds upon which a suit was brought by civil liberties groups in 1993 (for other aspects of the case, see the discussion of the "Kaitaia Shoplifter Trespass Scheme", para. 56 above). Following consultation with the Solicitor-General, the Privacy Commissioner, the New Zealand Law Society, and the Police Complaints Authority, among others, new guidelines were issued imposing stricter criteria for the selection, content and publication of material identifying active criminals, and the plaintiff then discontinued the proceedings.

80. Section 208 (c) of the Children, Young Persons, and Their Families Act 1989 states that any measures for dealing with offending by children and young persons should be designed to strengthen the family, whanau, hapu, iwi and family groups of the child or young person, and that it should foster the ability of families to develop their own means of dealing with the offending of their children or young people. The family group conference process is central to the Act. The Act does not allow for any proceedings to be instituted against a young person unless a youth justice coordinator is consulted and a family group conference held. The family group conference will make such decisions and recommendations and formulate such plans as it considers necessary or desirable in relation to the young offender and, upon the agreement of the law enforcement officer, the decisions, recommendations and plans will be put back to the Youth Court for the Court's consideration and implementation.

## Article 15

81. The principle that penal enactments shall not have retrospective effect is now reflected in section 26 of the New Zealand Bill of Rights Act 1990. In 1992 the Attorney-General raised a question whether clause 121 of the Films, Videos, and Publications Classification Bill (now sect. 121 of the Act) infringed this provision.

## Article 16

82. The requirement that persons be recognized as such by the law is reflected in section 29 of the New Zealand Bill of Rights Act 1990.

## Article 17

83. Although the New Zealand Bill of Rights Act 1990 provides no direct reflection of article 17, section 21 of the Bill of Rights accords a right to be secure against "unreasonable search or seizure, whether of the person, property, or correspondence or otherwise".

84. The most important development during the period reported on has been the enactment of the Privacy Act 1993, a copy of which is provided as annex J. The Privacy Act was foreshadowed in paragraphs 86 and 89 of New Zealand's second report and further details were provided in reply to written and oral questions of the Committee. The Government indicated in response to a written question that it proposed to introduce a data privacy bill later that year (1989). Unfortunately, progress was significantly slower and a bill was

not introduced to Parliament until 1991. Part of that bill was separately enacted in the Privacy Commissioner Act 1991 which established the office of the Privacy Commissioner and authorized certain information matching programmes between government departments. The balance of the bill stood referred to a select committee for study and public submission for 18 months.

85. The Privacy Act 1993 was passed on 17 May 1993 and came into force on 1 July 1993. Although the statute focuses in significant part on information privacy, the Privacy Commissioner also has certain responsibilities in respect of a wider range of privacy matters (for example, the Commissioner may inquire into practices that appear to interfere with people's physical privacy). The Privacy Act is divided into 12 parts. Parts I, IX and XII mainly deal with technical matters. Part II sets out 12 Information Privacy Principles ("IPPs") which may be summarized as follows:

(i) Principle 1 seeks to limit the purposes for which information may be collected;

(ii) Principle 2 aims at requiring information to be collected from the individual concerned;

(iii) Principle 3 recognizes the need for the individual from whom information is collected to know the purposes and destination of the information;

(iv) Principle 4 seeks to ensure that the manner of collection of information is lawful and fair;

(v) Principle 5 aims at protecting the security of information properly collected;

(vi) Principle 6 requires that an individual be assured access to information held about that individual;

(vii) Principle 7 aims at facilitating correction of information held about individuals;

(viii) Principle 8 urges that procedures be adequate to ensure the accuracy of information held about individuals;

(ix) Principle 9 proposes that information about individuals not be kept for longer than is required by legitimate purpose;

(x) Principle 10 aims at confining the use of information about individuals to the legitimate purposes for which it was obtained;

(xi) Principle 11 aims at preventing disclosure of information about individuals by the holding agency to third parties;

(xii) Principle 12 seeks to limit the assignment and use of "unique identifiers".

86. Under the Act individual citizens or other persons in New Zealand can request from agencies access to personal information held by those agencies

about them. Principle 7 of the Act gives individuals the right to request the correction of information held about them (sects. 33-45). The act recognizes that some circumstances require that personal information should not be disclosed to the individuals concerned. For example, the interests of "security, defence and international relations" are declared by section 27 to constitute "good reason" for refusing access. Trade secrets are also protected (sect. 28). A range of other reasons for withholding information about an individual is set out in section 29. However, the Privacy Act applies only to requests for information by individuals, not to requests by bodies corporate. Access by bodies corporate to personal information about themselves is still governed by sections 24 to 27 of the Official Information Act 1982. Since the Official Information Act applies only to State agencies, bodies corporate have a right of access to and correction of information only if it is held by such State agencies.

87. A procedure for the making of a complaint to the Privacy Commissioner alleging that any action "is or appears to be an interference with the privacy of the individual" is created by sections 66 to 77 of the Act. The Privacy Act enforcement regime for such complaints will come into force in stages. As from 1 July 1993 principles 5, 6, 7 and 12 (the principles of security, access, correction and unique identifiers) will be subject to all the enforcement provisions of the Privacy Act. This means that proceedings regarding a breach of these principles by a State or private sector agency can be brought before the Complaints Review Tribunal and ultimately before the High Court.

88. As far as the other information privacy principles are concerned, until 1 July 1996 complaints about breaches of those principles can be made to the Privacy Commissioner, but proceedings in respect of those complaints cannot be brought before the Complaints Review Tribunal or High Court. However the Privacy Commissioner has the power to investigate the complaint and make recommendations to the agency in respect of which the complaint was made.

89. The Privacy Commissioner also performs a range of other functions including monitoring compliance with the information privacy principles, issuing codes of practice, running educational programmes and receiving representations on matters concerning privacy. The first "Code of Practice" to be issued under the Act was the Health Information Privacy Code 1993 (Temporary), which applies to health information relating to an identifiable individual held by a health agency. It is currently undergoing review by the Privacy Commissioner prior to the issuing of a permanent code sometime before 1 July 1994.

90. The question of information matching, where one government department or agency has access to the database of another, is addressed in part X of the Act. Guidelines have been introduced which require specific statutory authority for matching, and ensure such practices are only established where there is a significant public interest in the matching.

91. Paragraph 214 of the first report mentioned the Wanganui Computer Centre Act 1976. This was repealed from 1 July 1993 by the Privacy Act. The Wanganui Computer Centre Privacy Commissioner's functions have been taken over by the Privacy Commissioner. Temporary codes of practice under the Privacy

Act are being developed for the purpose of law enforcement information. A code of practice may impose more or less stringent controls than the IPPs but, until the code of practice is in force, the information privacy principles in the Privacy Act will apply to law enforcement information.

92. The first annual report of the Privacy Commissioner is provided as annex K.

93. Paragraph 221 of the first report mentioned the Broadcasting Act 1976. This has been replaced by the Broadcasting Act 1989. The Act gives direct access to the Broadcasting Standards Authority where a breach of privacy is alleged. (Other complaints must be made first to the broadcaster.) Monetary compensation of up to $5,000 can be awarded. The highest amount awarded so far is $2,500.

94. New Zealand's first and second reports detailed the situation in respect of the interception of private communications. In 1992 the Ministry of Commerce commissioned a report entitled "Telecommunications and privacy issues" which identified a lack of protection under present law against both intentional and unintentional interception of cellular communications. The Ministry of Commerce sought comment on the report from members of the public and is currently investigating possibilities to address these problems.

95. As to the protection accorded to "honour and reputation", the period under review has seen the reform of New Zealand's defamation law. On 1 February 1993 the Defamation Act 1992 became law. It replaces the Defamation Act 1954 and clarifies and simplifies the law of defamation.

96. Part I of the Defamation Act 1992 covers defamation proceedings by bodies corporate. Bodies corporate may sue only if they can prove that the defamatory publication has caused pecuniary loss or is likely to do so.

97. Part II clarifies and improves the complex defences to defamation proceedings. The previous defence of justification is renamed "truth" to emphasize that truth is an absolute defence to defamation proceedings. The defence of truth will succeed if it is proved that a defamatory imputation is in substance true or not materially different from the truth. The whole publication is to be considered to determine whether an imputation is defamatory. The defence of fair comment is replaced by the defence of honest opinion. The defence of honest opinion will succeed if the defendant proves that the opinion expressed was his or her genuine opinion and was based on facts that are substantially true or not materially different from the truth.

98. In order to improve access to the law the Act lists those publications which are accorded absolute and qualified privilege in defamation proceedings. Absolute privilege protects live broadcasts from Parliament, parliamentary publications, Hansard, documents tabled in the House, judicial proceedings and other legal matters.

99. Fair and accurate reports on matters listed in the First Schedule of the Act are protected by qualified privilege. These include a delayed broadcast or report of proceedings in the House and a fair and accurate report of a government or parliamentary inquiry. The defence of qualified privilege can be defeated if the plaintiff shows that he or she requested the defendant to

publish a reasonable letter of explanation or a statement of contradiction and the defendant refused to do so. The defence will also be defeated if the plaintiff can show that in publishing the report the defendant was predominantly motivated by ill will against the plaintiff or otherwise took improper advantage of the occasion of publication.

100. The Act introduces the new remedy of a court recommended correction. At an early stage in defamation proceedings a judge may recommend that the defendant publish a correction of factual matter. The judge may recommend the content of the correction, the time of its publication and the prominence with which it is to be published. If the recommendation is accepted the proceedings will end. The plaintiff will be awarded solicitor and client costs against the defendant (unless the court decides otherwise) but will not be entitled to any other relief or remedy. If the defendant refuses to accept the recommendation the case will go to trial in the ordinary way. However, if the court then gives judgement in favour of the plaintiff, the failure to publish a correction will be taken into account in the assessment of damages awarded against the defendant. The Act also clarifies the law relating to punitive damages which may be awarded where a defendant has acted in flagrant disregard of the rights of the plaintiff.

## Article 18

101. Sections 13 and 15 of the New Zealand Bill of Rights Act 1990 affirm the right to "freedom of thought, conscience, religion, and belief, including the right to adopt and to hold opinions without interference", and to manifest religion or belief "either individually or in community with others". Under section 28(3) of the Human Rights Act 1993 employers must accommodate the religious practices of employees so long as these do not unreasonably disrupt the employer's activities.

## Article 19

102. The right to "hold opinions" is reflected in section 13 of the New Zealand Bill of Rights Act 1990, and a broadly-based right to "freedom of expression" is set out in section 14:

> "Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form".

103. In O'Connor v Police [1990-1992] 1 NZBORR 259, the High Court considered an order made in the lower court prohibiting publication of details of the tactics employed by defendants at a trial on a charge of trespass. The charges arose out of the action of demonstrators protesting against the activities of an authorized abortion clinic. The judge in the lower court formed the view that the tactics at the trial - of silence and non-cooperation - were an attempt to further the defendants' political objectives. The question arose whether the prohibition on publication of details of this conduct amounted to a denial of freedom of expression. In the High Court, Justice Thomas struck down the order prohibiting publication, holding that "freedom of expression" affirmed by the Bill of Rights was not displaced in this case because publication of the defendants' tactics of seeking to use the trial as a political platform would not seriously prejudice the conduct of the trial.

104. In respect of their news gathering activities, the news media are not covered by the information privacy principles in the Privacy Act 1993 (see paras. 84-90) so as to ensure that the freedom of the news media is not fettered.

105. A recognized exception to the freedom to impart and receive information has always been the presence of legal restrictions on indecent material. The law regulating such material has seen comprehensive reform in the period under review.

106. The Films, Videos and Publications Classification Act became law on 26 August 1993 although several parts of the Act will not enter into force until 1 February 1994; a copy of the Act is provided as annex L. The Act brings together in one enactment the law relating to censorship of printed and other material, the law governing the public exhibition of films, and the law regulating the labelling and classification of video recordings. A new Office of Film and Literature Classification is established by the Act: it will be responsible for the legal classification of all material covered by the Act.

107. A uniform set of revised classification criteria are set out in section 3 of the Act. The decision whether or not to prohibit a publication will depend on whether that publication is "objectionable". The legal test for prohibition of objectionable material is that the availability of the material "is likely to be injurious to the public good". Certain publications will be deemed to be objectionable on their own terms. These are publications which promote or support the sexual exploitation of children, sexual violence, acts of torture or extreme violence, bestiality, necrophilia, urolagnia and coprophilia. The Classification Office will be able to impose conditions on the public display of publications which have been classified as restricted. Possible conditions include a condition that a publication be displayed with the classification on its cover or package, that a publication be displayed in a sealed or opaque package, or that it not be publicly displayed, but only available on request.

108. The Act rationalizes offences and substantially increases penalties. Section 121 makes it an offence to possess any "objectionable publication", and (in subsection 3) provides that "it shall be no defence ... that the defendant had no knowledge or no reasonable cause to believe that the publication to which the charges relates was objectionable". It was in respect of this provision that the Attorney-General, the Hon. Paul East, reported to Parliament on 2 December 1992 (NZPD vol. 532 (1992) p. 12764-5) that the provision would, if enacted, be inconsistent with section 26 (1) of the New Zealand Bill of Rights Act 1990, and could not be justified by section 5 of that Act. The decision of Parliament was to enact the provision notwithstanding the report.

109. The Attorney-General reported to Parliament under section 7 of the New Zealand Bill of Rights Act 1990 that the Children, Young Persons, and their Families Amendment Bill raised a question of consistency with the right to freedom of expression. The Attorney-General reported that a proposed provision to require persons in certain occupational groups to report suspected child abuse to the authorities was inconsistent with section 14 of the Bill of Rights Act because "the State is requiring a person to express himself or herself, when that person would otherwise have had a choice". The

Attorney-General noted Canadian decisions in which a requirement to express oneself was viewed as a prima face infringement of freedom of expression. The Attorney-General was not satisfied that the infringement could be justified under section 5 of the Bill of Rights Act. At the time of writing of this report it is unclear what form any final legislation will take.

## Article 20

110. Modification of the prohibition against inciting racial disharmony, by section 61 of the Human Rights Act 1993, has been noted in paragraph 21 above.

## Article 22

### Paragraph 1

111. The New Zealand Bill of Rights Act 1990 provides a general right of freedom of association in section 17. Employees in New Zealand continue to have the right to freedom of association for the purpose of advancing their collective employment interests. This right is now primarily provided under the Employment Contracts Act 1991 which has replaced the Labour Relations Act 1987. State sector employees were brought under the same employment legislation by a 1991 amendment to the State Sector Act 1988 which replaced the State Services Conditions of Employment Act 1977. Other legislation noted in the 1989 report, the Trade Unions Act 1908, the Incorporated Societies Act 1908 and the Industrial Societies Act 1908 remains in place.

112. The Employment Contracts Act 1991 repealed the union registration system which applied under the Labour Relations Act and previous legislation. Under the present legislation, employees have the right to decide whether or not they will join an employees' organization, and if so, which organization. The Act provides protection against undue influence and preference in employment in relation to membership or non-membership of a union or other employees' organization. Thus union membership is entirely voluntary. Personal grievance provisions which must be included in all employment contracts provide remedies against duress in relation to an employee's membership or non-membership of an employees' organization and against discrimination on the basis of involvement in the activities of an employees' organization.

113. Freedom of association in the bargaining process is also protected by the requirement that employees' representatives have the right of access to those employees for the purposes of negotiation. Employers must recognize the employees' authorized representative. A further safeguard is that if a contract is procured by harsh and oppressive behaviour or by undue influence, or if the contract or any part of it is harsh and oppressive, it can be set aside in part or as a whole by the Employment Court.

114. Employees' organizations are not required to register under any legislation. Existing unions became incorporated societies registered under the Incorporated Societies Act 1908, maintaining their current rules, when the Employment Contracts Act took effect. It is then a matter of choice for unions as to whether or not they remain registered under the Incorporated Societies Act. Unions may register under the Trade Unions Act 1908, which protects unions against prosecution for restraint of trade. They do not have to register to receive this protection.

115. The State Sector Act, as amended in 1991, applies the Employment Contracts Act to the public sector. Thus public sector employees have the same freedom to join unions of their choice as private sector employees. There are however, somewhat different arrangements for the employers' side of the bargaining process, in recognition of the Government's interest in the outcomes of bargaining for State agencies which are funded by and accountable to it. The State Services Commission is responsible for negotiating, in consultation with employers, collective employment contracts in the public, health and education services. The Commission may delegate this responsibility to the employers, and has done so in practice for the current round of negotiations. In the tertiary sector this responsibility was devolved to the employers by statute in 1992, but tertiary employers are required to consult with the Commission before entering into any collective employment contract.

Paragraph 2

116. There are no restrictions on the right to associate collectively. Such restrictions as are provided by the Act relate to the bargaining process, and can be considered necessary in the interests of the ordre public. More specifically, they are intended to ensure that representatives are accountable to the employees they represent and that the chosen representative is accorded the status necessary effectively to represent the employees. Employees may choose to be represented in negotiations by a union or another employees' organization or by an individual or a group of employees. For the purposes of negotiation, the chosen representative must establish its authority to represent the employees, the employers must recognize the authorized representative. Employers are not required to negotiate, but if they do so, they must negotiate with the authorized representative. Some recent court cases have established that employers may attempt to persuade employees to negotiate directly with the employer, but may not use undue influence in doing so. In a recent appeal of one of these decisions, the Court of Appeal, while dismissing the case because the relevant contracts had expired, nevertheless took the opportunity to question the Employment Court's ruling. The President of the Court of Appeal said that recognition of an employees' representative should mean that the employer must negotiate with that representative if he or she negotiates at all, and does not mean that the employer can bypass the representative and negotiate directly with the employees. These comments may be taken as an indication of the approach the Court is likely to take in future cases on this issue.

117. The parties may negotiate individual or collective employment contracts. The type of contract is a matter for negotiation between the parties. Collective contracts may cover one or more employers and any agreed group of employees working for those employers. The parties must also agree on a procedure for ratification of any proposed settlement within the three months before the negotiations begin. Each contract covers only those who have agreed to it.

118. Employees have the right to strike and employers to lockout when seeking a collective contract, provided that there is no collective contract in force and the strike relates to the negotiation of the contract. There are some conditions in which strikes and lockouts are unlawful, generally where there are alternative procedures available to resolve the dispute. Strikes and

lockouts concerned with the issue of whether a collective contract will bind more than one employer are unlawful. This provision is intended to protect the freedom of employers not to associate with other employers in collective bargaining. Employers and others affected by unlawful strikes and lockouts can take action against the parties to the strike or lockout.

119. The prohibition against refusal of admission to organizations of employers or employees is now found in section 37 of the Human Rights Act 1993. In accordance with the general scheme of that Act as reported in paragraphs 29 and 30 of this report, it is unlawful for admission to be refused, or for a person to be expelled, on any of the prohibited grounds.

Paragraph 3

120. New Zealand has not ratified International Labour Organisation (ILO) Convention No. 87 concerning Freedom of Association and Protection of the Right to Organise. The Employment Contracts Act has repealed the provisions of the previous legislation which have prevented ratification in the past, and the Act provides no apparent impediment to the employees' right to associate and to establish collective organizations. However, ILO holds certain rights to be implicit in the Convention. One of these is the right to bargain collectively with employers regarding conditions of work. In addition, there are residual questions as to whether the Act complies with the spirit of the Convention, and further monitoring of the practices and outcomes under the Act will be required to assess this.

121. It is appropriate to report that early in 1993 the Council of Trade Unions (the central organization for employee organizations) forwarded a formal complaint to the Freedom of Association Committee of ILO, that the Employment Contracts Act contravened the operation and application of ILO Conventions Nos. 87 and 98 in New Zealand. The Government's response to these claims is currently being considered by ILO.

## Article 24

122. The New Zealand Government ratified the Convention on the Rights of the Child on 13 March 1993. Various measures relating to the welfare of children have been discussed at other points of this report (corporal punishment at para. 35, the protection afforded to children in the investigation and prosecution of criminal offences at paras. 46-50). As has been indicated, the principal legislation is the Children, Young Persons, and Their Families Act, 1989, a copy of which is provided as annex M.

123. The Children, Young Persons, and Their Families Act 1989 has replaced previous children and young persons legislation. An important part of the Act is the responsibility it places on parents and other family members, including culturally recognized family groups, for the welfare of their children. Ensuring that families carry out their responsibilities in respect of family members is a key aspect of the New Zealand Government's wider social policy objectives. Central to both the care and protection and youth justice provisions of the Act is the decision-making process of the family group conference. This is a formal process under the Act which brings together the wider family and other involved parties to make decisions about how to deal with care or protection issues or offending by a young person.

124. Section 6 of the Act states that the welfare and interests of a child or young person will be the deciding factor in the administration and application of both the care and protection and youth justice provisions of the Act. Where any conflict of principles or interests arises, the welfare and interests of the child or young person shall be the deciding factor. As a result of a 1991 ministerial review of the Act, it is proposed to replace the existing section 6 with a clear stand-alone statement on the priority of the paramountcy principle for care and protection matters, to ensure that family interests do not override the interests of the child or young person. Regard, however, will still need to be had to the other principles in the Act, which emphasize the fundamental importance of family/whanau.

125. As a result of the ministerial review, the Government has also proposed for the consideration of Parliament including the mandatory reporting of child abuse in the legislation from 1 July 1994. This would make reporting mandatory for members of the police, Department of Social Welfare social workers, registered medical practitioners, Plunket public health and school dental nurses, registered psychologists, child care workers, kindergarten and school teachers, probation officers and barristers and solicitors. The Attorney-General's report on this proposal is discussed at paragraph 109 of this report.

126. Children (10 to 13 year-olds) and young people (14 to 17 year-olds) detained in the custody of the Director-General of Social Welfare are protected by the Residential Care Regulations (1986) and the Residential Code of Practice 1991 which states that young persons will be treated as individuals whose rights and dignity should be acknowledged and respected. The Code requires that the unique capacities, needs and situations of each individual are both recognized and addressed, and that allowances are made for the different cultural and education backgrounds of each person. Staff are bound also to protect personal rights such as privacy, freedom of expression and/or religious and ethical belief, and freedom from harsh, degrading or humiliating treatment and also to respect the confidence of the young person. Young persons must be provided with opportunities to express their views as to the policies, practices and conditions in the residence. They must be informed of the content of any reports, recommendations or other information which may influence decisions about the young person's care or welfare and give the opportunity to dispute or comment on any such report, recommendation or information. All residential routines are subject to a regular, documented reviewed process to ensure that they are consistent with the requirements of the Youth Justice and Care and Protection sections of the Children, Young Persons, and Their Families Act 1989.

127. The Guardianship Amendment Act 1991 implements New Zealand's ratification of the Hague Convention on the Civil Aspects of International Child Abduction. It provides for the immediate return of children who are unlawfully removed to New Zealand from another State which is party to the Convention. The Secretary for Justice is designated as the central Authority for the purposes of the Convention. The Act provides for applications to be made to the central Authority for the return of children abducted to New Zealand from another contracting State. On receiving such applications, the Authority must take certain actions to secure the prompt return of the abducted child.

## Article 25

128. The Term Poll Act 1990 gave electors at the 1990 general election the opportunity to choose between a three year and a four year parliamentary term. Electors voted to retain the three year parliamentary term.

129. The Electoral Referendum Act 1992 provided for an indicative referendum on the electoral system which was held on 19 September 1992. Voters were asked two questions. First, whether they favoured retention of the current first past the post electoral system or a change to the voting system. Both those who favoured change and those who did not were then asked to select from among four options, the system of proportional representation which they would favour in the event of a change. The majority of voters in the referendum favoured a change to the voting system. Mixed member proportional was the system favoured in the event of a change.

130. The Electoral Referendum Act 1993 provided for a further binding referendum on the issue of electoral reform. At the 1993 general election voters were asked in a binding referendum to choose between MMP (the reform option favoured by the majority of voters in the indicative referendum) and the current first past the post electoral system. They chose MMP.

131. A new Electoral Act 1993 was also passed before the binding referendum on electoral reform, enabling future general elections to be conducted on the basis of MMP. Following the majority vote for MMP in the 1993 referendum on electoral reform, key provisions of the Electoral Act 1993 are now in force. These include provisions relating to registration of voters, qualifications of candidates and Members of Parliament, the Maori option and the drawing up of the new constituency seat boundaries by the Representation Commission. The remaining parts of the Act will come into effect on 1 July 1994. Among other matters these remaining parts of the Act provide for the registration of political parties and the conduct of general elections under the new MMP electoral system.

## Article 27

132. As will be evident from New Zealand's eighth and ninth consolidated report to the Committee on the Elimination of Racial Discrimination (CERD/C/184/Add.5), there has in recent time been a greatly increased awareness of the fundamental significance of the Treaty of Waitangi, entered into between representatives of the British Crown and Maori Chiefs and Tribes in 1840, as a founding document for the modern State of New Zealand. The Treaty is specifically referred to in a manner cognizable by courts in a number of statutes, while others make reference to the aims and aspirations of Maori. A list of these in provided as annex N.

133. Maori are able to make claims against the Crown under the Treaty of Waitangi Act 1975. These claims may issue from any grievance that has arisen since the signing of the Treaty in 1840. Some 340 claims have now been lodged with the Waitangi Tribunal, the body established by the Act to hear such claims. The Tribunal has heard and made recommendations on about 30 of these claims and the Government has accepted many of the Tribunal's recommendations. Approximately 100 of the Tribunal's recommendations are in various stages of being implemented or have been fully implemented.

134. In an attempt to speed up the claims resolution process the Government in 1989 established a mechanism for direct negotiations with Maori claimants. Claimants can, providing their claim fits certain criteria, elect to forgo the formal Waitangi Tribunal hearing process and negotiate directly with the Minister in Charge of Negotiations who was specifically charged by Cabinet with conducting Treaty negotiations. In addition, a number of the Tribunal's recommendations often require further discussion and negotiations between Maori claimants and the Crown. The Minister of Justice, who is also the Minister in Charge of Negotiations, is responsible for these negotiations. The Cabinet Committee on Treaty of Waitangi issues was also established in 1989 to oversee all policy on Treaty-related matters. This Cabinet Committee is served by officials from the Department of the Prime Minister, Treasury, Department of Justice, the Crown Law Office and Te Puni Kokiri (the Ministry of Maori Development).

135. In paragraph 150 of the second report, attention was drawn to the Kohanga-Reo (language nest) programme whereby Maori language, customs and values are acquired by pre-school children from their elders. In 1987 there were 513 such nests. By the end of 1992 there were 719, accommodating 12,616 children. Within the primary school system itself are the Kura Kaupapa Maori programmes, in which most instruction takes place using te reo Maori (Maori language). In 1990 there were 6 such programmes, in 1991 10, in 1992 13, and by the end of 1993 it is anticipated that there will be 29 such programmes with a total of 510 students. There is also a marked increase in education programmes with a significant Maori content. Such programmes, referred to as "Maori medium education" have increased from 50 in 1987 (for 2,712 students) to 265 in 1992 (for 14,436 students).

136. The second report had noted, at paragraph 149, the enactment of the Maori Language Act 1987. By the Maori Language Amendment Act 1991, the right to speak Maori in legal proceedings has been widened to include Commissions of Inquiry and similar bodies, the Children and Young Persons Courts, and the Tenancy Tribunal. From 1 February 1988 to 30 June 1992 there were 65 cases in the courts in which interpreters in the Maori language were used.

137. On 1 July 1992 the Museum of New Zealand Te Papa Tongarewa Act 1992 came into force. This Act, which combined the former National Art Gallery and National Museum as a single institution, requires that the Museum:

> "shall have regard to the ethnic and cultural diversity of the people of New Zealand, and the contributions they have made and continue to make to New Zealand's cultural life and the fabric of New Zealand society".

It further requires the Museum to:

> "endeavour to ensure both that the Museum expresses the mana (authority, influence, prestige) and significance of Maori, European, and other major traditions and cultural heritages, and that the Museum provides the means for every such culture to contribute effectively to the Museum as a statement of New Zealand's identity".

138. In order to give proper recognition to the Maori people as the tangata whenua (indigenous people of the land) of Aotearoa/New Zealand,

the Museum has established a Department of Maori Art and History and is drawing on Maori cultural expertise in its governance and administration.

139. The Queen Elizabeth II Arts Council of New Zealand Act 1974 has been reviewed and new legislation has been introduced into Parliament. One of the provisions of the Arts Council of New Zealand Bill is to establish a new statutory body for public support of the arts which will better reflect the important role of Maori in the arts of New Zealand.

140. The new structure would replace the present Council for Maori and South Pacific Arts, which is a subsidiary body of the Queen Elizabeth II Arts Council. As drafted, the Bill proposes the establishment of a national body for the arts known as the Arts Council of New Zealand and two boards of equal status which will deliver funding to the arts. One (to be known as Te Waka Toi) would support Maori arts. The other would be responsible for supporting the arts of all New Zealanders.

141. In addition to recognizing the role of Maori in the arts, one of the principles of the Bill is recognition of "the ethnic and cultural diversity of the people of New Zealand and the contribution they are making to New Zealand's artistic life and the fabric of New Zealand society". One of the responsibilities of the arts board would include the allocation of funding to the arts of the Pacific Islands and other ethnic minorities in New Zealand.

142. Under the Radiocommunications Act 1989, frequencies suitable for radio and television broadcasting were reserved throughout New Zealand for the use of broadcasters promoting Maori language and culture. Twenty-three tribally based radio stations now broadcast on these frequencies. In addition, AM frequencies were provided for a national Maori broadcaster, Aotearoa Maori Radio, in Auckland, Wellington, Christchurch and parts of the Bay of Plenty.

143. The Broadcasting Act 1989 established the Broadcasting Commission (usually referred to as "New Zealand on Air") and specified its functions, which include the promotion of Maori language and culture and the provision of broadcasts of interest to minority groups. New Zealand on Air receives revenue from a public broadcasting fee. New Zealand on Air is required by ministerial direction to spend at least 6 per cent of its annual public broadcasting fee revenue on Maori broadcasting. It provides funding for all but one of the tribal radio stations and also for television programmes promoting Maori language and culture. The Broadcasting Amendment Act (No. 2) 1993 established a new Maori broadcasting funding agency, Te Reo Whakapuaki Irirangi, which shares with New Zealand on Air responsibility for funding for Maori broadcasting. Te Reo Whakapuaki Irirangi will receive funding by government vote for its first three years of operation. After three years, it will assume control of all funding for Maori broadcasting.

144. Access stations provide airtime on a non-profit basis to a range of minority groups in the community. At present there are eight Access radio stations operating in New Zealand. These stations have gained access to their frequencies in a number of ways. Wellington Access Radio, Plains FM in Christchurch and Access Radio Auckland were established in 1989 with the support of Radio New Zealand. Subsequently, the Government, in addition to the frequencies reserved for Maori use, reserved 29 AM frequencies in communities of 10,000 population or more to ensure there is provision for

non-commercial groups who wish to broadcast. Stations in Nelson and Hamilton, and later Auckland, were set up in accordance with this policy. In addition, some non-profit community-based organizations in Otago, Southland and Wairarapa have chosen to obtain frequencies through commercial channels by leasing time from existing stations. All these stations have been assisted in providing access to minority community groups by New Zealand on Air, which provides funding for the operational costs of the station.

## III. TOKELAU

145. This part of the report relates to Tokelau and supplements the initial report on Tokelau submitted by the New Zealand Government in January 1982 (CCPR/C/10/Add.10), and the second periodic report submitted in June 1988 (CCPR/C/37/Add.11). It should be read in conjunction with the initial report on implementation of the International Covenant on Economic, Social and Cultural Rights with regard to Tokelau (E/1990/5/Add.11).

146. The most significant developments in Tokelau relating to the implementation of the Covenant concern the development of local institutions of government in Tokelau. Over the five-year period under review a number of events have combined to produce the shift to greater internal self-government that has occurred since July 1992. For logistical reasons much of the administration of Tokelau and the Tokelau Public Service has long had its base in Apia, Western Samoa. The elders of Tokelau saw this system as distant, and also as the operation of an alternative administrative system which challenged the traditional organization of the villages of Tokelau. Successive measures to meet these concerns, the reconstruction required in the wake of recent serious cyclones, the purchase of a purpose-built vessel which allows for regular inter-atoll communication, and the completion of a report on the relocation of the Tokelau Public Service, enabled plans to be advanced during 1993 for the location of many public servants in Tokelau itself and the taking-over of responsibility for their activities by the local custom-based authorities. At a political level the policy direction was confirmed by the General Fono of Tokelau in August 1992. Tokelau reaffirmed its wish to take greater responsibility for its own government, formalized the request to the New Zealand Government for a legislation-making power for the General Fono, promulgated its own internal management rules in the form of Standing Orders, and took the first steps towards operating a new system of local government. In that system the leaders of each village (Faipule), elected by universal adult suffrage in each village, become the Standing Committee of the General Fono with power to act between sessions of the General Fono. The three village leaders each in turn take the role of Leader of Tokelau (Ulu O Tokelau) for one year. The Standing Committee (known as the Council of Faipule) will function in many ways as a council of ministers and each Faipule will have responsibility for specific areas of administration and the civil servants who work in those areas.

147. The formal constitutional underpinning for these new arrangements is coming into place. On 1 October 1993 the Tokelau Administration Regulations 1993 came into force and pursuant to these Regulations, the Administrator of Tokelau on 27 January 1994 delegated the powers exercisable by him in respect of Tokelau to the General Fono and to the Council of Faipule when the General Fono is not in session. In addition the New Zealand State Services Commissioner has delegated his powers as employing authority of the

Tokelau Public Service Commission to Tokelau Public Service Commissioners. Two Commissioners, one from New Zealand and the other from Tokelau, were appointed during 1993.

148. At the end of 1990 a bilingual (Tokelauan and English) human rights booklet was produced by the Tokelau Administration for the information and use of the people of Tokelau. That bilingual collection, which it is believed is a first in the Pacific region, includes the texts of the main human rights documents of relevance to Tokelau:

The Universal Declaration of Human Rights;

The International Covenant on Civil and Political Rights;

The Optional Protocol to the International Covenant on Civil and Political Rights;

The International Covenant on Economic, Social and Cultural Rights; and

The Convention on the Elimination of All Forms of Discrimination Against Women.

Following the publication of this booklet the UNDP Special Projects Officer for the Tokelau law project, Hosea Kirifi, went to a UNESCO-funded seminar on the United Nations human rights instruments in Rarotonga, Cook Islands in 1990, accompanied by the Faipule of Nukunonu, an Elder of Tokelau.

149. As part of the process leading towards self-determination the General Fono has continued its involvement in the development of the legislation needed for Tokelau and the consideration of external initiatives for legislation which are brought to its attention (for example, the prohibition on drift-net fishing in the Pacific area). Between 1988 and 1993 legislation was prepared in the context of the Tokelau law project in accordance with instructions of the General Fono and promulgated by New Zealand to deal with the following matters: the control of banking and insurance business, the regulation of the Tokelau police, plant and animal disease control, postal services, customs regulation, immigration, commissions of inquiry, and marine salvage. Additional projects from the General Fono which are awaiting approval by the New Zealand Government concern pesticides control, arbitration, safety standards in relation to dangerous goods and the incorporation of private bodies.

150. Information for the people of Tokelau on their system of government has been provided by the publication of all new legislation in bilingual text form, and the publication of other texts specifically related to constitutional development: Tokelau: A Collection of Documents and References Relating to Constitutional Development (1991) and the Laws of Tokelau 1993 (four volumes, 1993).

151. Information on Tokelau relating to specific articles of the Covenant follows.

## Article 1

152. The development of Tokelau towards the exercise of its right of self-determination during the period under review is indicated in paragraph 2 of this report. The main features of that development were commented upon by the Ulu O Tokelau at the June 1993 meeting of the Special Committee on Decolonization at Port Moresby in Papua New Guinea. The Leader of Tokelau there specifically mentioned, in the context of the development of political responsibility, the changes in relation to the establishment of a Council of Faipule, the nomination of a titular head for Tokelau, the formalization of constitutional power by delegations from the relevant New Zealand authorities and the changes about to take place in the organization of the Tokelau Public Service. The Council of Faipule has indicated that Tokelau will take a step-by-step approach to the assumption of new governmental responsibilities and use the 1993-1995 period as one of consolidation.

## Article 12

153. The new provisions relating to immigration foreshadowed in the periodic report of 1988 were promulgated as the Tokelau Immigration Regulations 1991 and came into force on 1 August 1991. The Tokelau Islands Departure Regulation 1952 and the Aliens Immigration Restriction Ordinance 1924 (of the Gilbert and Ellice Islands colonial period) were repealed by the Tokelau Immigration Regulations 1991. There is now no restriction on the right of any person to leave Tokelau. Nor is there any provision for a Tokelauan to be deprived of the right to enter Tokelau. The Tokelau Immigration Regulations provide for New Zealand citizens who are Tokelauans to be in Tokelau or to visit, or reside, or work in Tokelau without restriction. New Zealand citizens who are not Tokelauans may enter Tokelau and be in Tokelau for short periods without restriction but may not reside in Tokelau, nor work in Tokelau, without obtaining a permit. The main purpose of the permit is to ensure that appropriate accommodation and other facilities are available in Tokelau for the outsider. There are separate provisions for the entry into Tokelau of non-New Zealand nationals who are not Tokelauans.

## Article 13

154. Provision is made in regulation 15 of the Tokelau Immigration Regulations 1991 for the issue by the Administrator of Tokelau of an order for the removal of any person who is unlawfully in Tokelau. The regulations provide for the revocation of permits where there is good reason to do so in the interests of Tokelau. It is a requirement of the regulations that, except in special circumstances, no permit shall be revoked without first informing the permit holder of the Administrator's intention and considering any reasons advanced by the holder as to why the permit should not be revoked. Challenge of decisions by the Administrator in respect of the issue of removal orders of the revocation of permits is subject to judicial review in accordance with the Common Law rules relating to judicial review of administrative action.

## Article 14

155. The Tokelau Crimes, Procedure and Evidence Regulations await promulgation in Wellington. Pending their promulgation criminal process is governed in

nearly all respects by the rules of the Common Law of England. There are very few criminal cases in Tokelau in any year and the bulk of those cases continue to be concerned with matters that would be classified as petty offences in metropolitan New Zealand: drunkenness, theft of chattels of small value, and common assault. In 1991 the Tokelau Commissions of Inquiry Regulations were promulgated. They replace earlier legislative provision which was extended to Tokelau without specific adaptation to its needs. The Commissions of Inquiry Regulations provide for the establishment of a commission by the Administrator of Tokelau for a wide range of public purposes. The regulations require that any commission shall act independently and that it shall in all its proceedings observe the rules of natural justice and as a matter of principle conduct its hearings in public. Any witness who gives evidence and any person who appears before a commission shall have the same privileges and immunities as witnesses and counsel in courts of law. The proceedings of a commission are privileged in the same manner as if they were proceedings in court.

## Article 17

156. The Tokelau Post Office Regulations 1991, on 1 March 1991, replaced the Post Office Act 1959 of New Zealand which had been extended to Tokelau. Those regulations make provision for Tokelau-specific postal, telegraphic and radio transmission services. Where it is necessary in the interests of the security of Tokelau or of the postal services that a postal article be opened or examined, the regulations require that the opening and examination be carried out at a post office in the presence of the constable and that a full record be made and kept of the reasons for the opening or examination of the postal article and the consequences. The addressee is to be informed of those matters. It is an offence under the regulations for any postal officer to open or permit the opening of any postal article, or to delay its transmission, or to divulge information relating to the contents of a postal article that has come to the officer's knowledge in the course of duty.

157. The Tokelau Commissions of Inquiry Regulations 1991 provide (in addition to the rules set out above in the paragraph on article 14) that a commission of inquiry shall not in any report make any comment that is adverse to any person unless that person has first been given a reasonable opportunity to be heard. In addition to the rules of natural justice that relate to judicial hearings, administrative decisions, and the operation of commissions of inquiry, the Standing Orders of the General Fono (the principal organ of government of Tokelau) provide in Standing Order 7 that, subject to the requirements of public order, every General Fono shall be open to the public and that the Chairperson of the General Fono may allow any person to speak on any matter under consideration at the General Fono.

## Article 22

158. The Tokelau Public Service is under the jurisdiction of the New Zealand State Services Commission and remains the only substantial employer in Tokelau. It is expected that with the transfer of Tokelau government functions to Tokelau in the near future the villages may take over the employment of some workers. When that happens steps will be taken to have

appropriate employment legislation promulgated for Tokelau to comply with and implement the relevant international conventions and the provisions of the Covenant. As at 30 June 1993 there were 165 employees in the Tokelau Public Service. Since the second periodic report there has been one divorce application and one divorce in Tokelau.

## Article 25

159. The election of village officers has taken place regularly in accordance with the Tokelau Village Incorporation Regulations 1986. The last election was in January 1993. The next election will be in January 1996.

LIST OF ANNEXES **

Annex A New Zealand Bill of Rights Act 1990, No. 109

Annex B Human Rights Act 1993, No. 82

Annex C Annual reports of the Human Rights Commission and the Race Relations Conciliator for the years 1989, 1990, 1991 and 1992

Annex D "Status of New Zealand women 1992", Second New Zealand report under the Convention on the Elimination of All Forms of Discrimination Against Women

Annex E "Final report on emergencies", New Zealand Law Commission (NZLC R22 1991)

Annex F Second and third annual reports of the Police Complaints Authority (1991, 1992)

Annex G Mental Health (Compulsory Assessment and Treatment) Act 1992, No. 46

Annex H Report of the ministerial inquiry into management practices at Mangaroa Prison (1993)

Annex I Terms of Reference for New Zealand's Refugee Status Section of New Zealand Immigration Service and Refugee Status Appeals Authority

Annex J Privacy Act 1993, No. 28

Annex K First annual report of the Privacy Commissioner

Annex L Films, Videos and Publications Classification Act 1993, No. 94

Annex M Children, Young Persons, and Their Families Act 1989, No. 24

Annex N List of statutes which make reference to the Treaty of Waitangi

Annex O Te Ture Whenua Maori Act 1993, No. 4

In addition, the following Statutes make reference to the aims and aspirations of Maori:

Local Government Act 1974: section 119 (2) (d)

Fire Service Act 1975: section 83A (2) (d)

Law Practitioners Act 1982: section 42A (2) (d)

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** The annexes are available for consultation in the files of the Secretariat.

Law Commission Act 1985: section 5 (2) (a)

Commerce Act 1986: section 18A (2) (d)

State Sector Act 1988: sections 56 (2) (d), 77A (2) (d)

State-Owned Enterprises Amendment Act (No. 4) 1988: section 4 (2) (d)

New Zealand Symphony Orchestra Act 1988: section 8 (2) (d)

Broadcasting Act 1989: clause 5 (2) (d) of Schedule

Education Act 1989: section 337 (2) (c)

Foundation for Research, Science, and Technology Act 1990: clause 11 (2) (d) of First Schedule

Defence Act 1990: section 59 (2) (d)

Social Welfare (Transitional Provisions) Act 1990: section 13 (2) (d)

Civil Aviation Act 1990: clause 28 (c) of Third Schedule

Resource Management Act 1991: clause 24 (d) of Fifth Schedule

Business Development Boards Act 1991: clause 13 (2) (d) of Schedule

New Zealand Tourism Board Act 1991: clause 13 (c) of Schedule

Accident Rehabilitation and Compensation Insurance Act 1992: clause 21 (2) (d) of Schedule

Museum of New Zealand Te Papa Tongarewa Act 1992: clause 4 (2) (d) of Schedule

Crown Research Institutes Act 1992: section 5 (4) (d)

Health and Disability Services Act 1993: section 2 (definition of "good employer")

Historic Places Act 1993: section 69 (c)

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